(2)

No. 91-1397

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

CITY OF TUKWILA,

Petitioner,

v.

WORLD WIDE VIDEO, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to decide whether Tukwila Ordinance 1465 leaves open reasonable alternative avenues of communication since the issue was never decided by the court below?

2. Does the Washington Supreme Court's determination that certain portions of Tukwila Ordinance 1465 are non-severable rest on independent and adequate state law grounds such that this Court lacks jurisdiction to review the issue of severability?

3. Is the decision of the Washington Supreme Court rendered moot by the enactment of Tukwila Ordinance 1581 which amends portions of Ordinance 1465?

4. Does the Washington Supreme Court's determination that Tukwila Ordinance No. 1465 is not narrowly

tailored to further a significant governmental interest conflict with prior decisions of this Court?

5. Should this Court defer to the factual findings made by the lower court which were the basis of the judgment?

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I. STATEMENT OF THE CASE

The Respondent's business is located in a converted single family residence along a local thoroughfare known as Interurban Avenue. I RT 53.[1],[2] The business has both a retail component and video viewing booths. FF 2. The retail department and the booths are located in separate rooms. I RT 56. In the retail department, the business rents and sells sexually explicit video tapes and it

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[1] Trial in this case took place on May 10, 11 and 12, 1989, and each day of trial represents a separate volume of the trial transcript. These volumes are referred to as I RT, II RT and III RT respectively.

[2] Pursuant to Supreme Court Rule 29.1, counsel represents that there are no parent or subsidiary companies of the respondent World Wide Video.

sells sexually explicit magazines and novelty items. FF 2, I RT 56. According to Tukwila Ordinance No. 1465, the business qualifies as an "adult bookstore" under subsection 1(A)(1), an "adult motion picture theater" under subsection 1(A)(5), an "adult retail store" under subsection 1(A)(6), and an "adult video store" under subsection 1(A)(8).

According to the subsections of the ordinance referred to above, businesses fall within the definition of "adult bookstore," "adult retail store," and "adult video store" if ten percent or more of their stock in trade consists of sexually explicit material. There is no percentage figure given in the definition of the phrase "adult motion picture theater" but the definition on its face would apply to a building used for the

presentation of a single sexually explicit film.

The land use studies considered by Senior Planner Jack Pace prior to recommending enactment of Ordinance No. 1465 were done in the seventies and early 1980's. I RT 80. They were done prior to the explosion of the home video market and they dealt mainly with "movie theaters," meaning businesses which show reel to reel film and have seating areas for the audience. I RT 80-82. None of the studies or court decisions relied upon by Mr. Pace in recommending enactment of Ordinance No. 1465 considered the land use effects of businesses which sell or rent video tapes exclusively for home viewing. Id. At the time of trial, testimony was presented that businesses of this nature

were operating in the City of Tukwila and in nearby communities. II RT 311-321.

None of the land use studies considered by Mr. Pace establish that businesses which have ten and a half percent sexually explicit material cause the same adverse secondary effects as those which have one hundred percent of their business devoted to such material. FF 27.

At the time that Mr. Pace undertook his land use study, the City had the opportunity to consider the actual effects of adult entertainment businesses within its boundaries and failed to do so. FF 23. No evidence was presented to the City Council or to the trial court suggesting that the respondent's business caused depreciation of property values. FF 22. Other businesses in the immediate neighborhood of the Respondent's business

included a night club, a card room and two taverns. FF 3. According to police statistics compiled between November 1987 and January 1989, other businesses in the area have generated more crime than the Respondent's business. FF 25, 26. There is no evidence that the Respondent's business has inhibited real estate development in the neighborhood in which it is located. I RT 78.

Tukwila Ordinance 1465 relegates businesses such as that belonging to the Respondent to the M-2 Heavy Industrial District. The trial court made a finding that there is no land available in the M-2 zone that would support a small retail business such as that belonging to the Respondent. FF 38.

After the Washington Supreme Court issued its written opinion, the Petitioner filed a motion for

reconsideration. See Appendix A. In the motion, the Petitioner argued that the portion of Ordinance 1465 imposing exclusionary zoning on "adult motion picture theaters" as defined in subsection 1(A)(5) should be severed from the sections which the court declared unconstitutional. Id. The motion for reconsideration was denied.

In October 1990, the Tukwila City Council enacted Ordinance No. 1581 which is set forth in its entirety in Appendix B. Ordinance 1581 deals with the same subject matter as Ordinance 1465. Id.

II. SUMMARY OF ARGUMENT

The Respondent maintains that this Court lacks jurisdiction to decide whether Tukwila Ordinance No. 1465 leaves open reasonable alternative channels of communication because that question was

never decided by the lower court. Similarly, this Court lacks jurisdiction to decide whether certain portions of Ordinance No. 1465 are severable because that issue was decided adversely to the Petitioner on independent and adequate state law grounds. There is no "case" or "controversy" within the meaning of Article III of the United States Constitution because this case is rendered moot by the enactment of a new ordinance which amends the pertinent sections of Ordinance No. 1465. The Washington Supreme Court correctly applied the principles announced by this Court in City of Renton v. Playtime Theater, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), in determining that Ordinance No. 1465 was not narrowly tailored to serve a significant governmental interest. Finally, this

Court should defer to the factual findings of the lower court which were the basis of the judgment in the Respondent's favor.

III. ARGUMENT

A. This court lacks jurisdiction to decide whether Tukwila Ordinance No. 1465 affords reasonable alternative channels of communication.

In City of Renton, supra this Court held that content neutral adult entertainment zoning ordinances are to be measured by the standards for determining the constitutionality of time, place and manner restrictions. 475 U.S. 49, 50. The Respondent assumes for the sake of this argument that Tukwila Ordinance No. 1465 is content neutral and was passed for a non-discriminatory purpose. The standard for measuring the constitutionality of content neutral time, place and manner restrictions is

whether they are narrowly tailored to serve a significant governmental interest and leave open alternative channels of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).

The Petitioner has invited this Court to decide the broad question of whether or not Tukwila Ordinance No. 1465 comports with the First Amendment and argues at pp. 22-24 of its Petition that the ordinance provides for ample alternative channels of communication. However, in making the determination that Ordinance No. 1465 violated the First Amendment, the Washington Supreme Court simply determined that the ordinance was not "narrowly tailored" and specifically declined to decide whether or not the ordinance unreasonably limited alternative channels of communication.

World Wide Video v. City of Tukwila, 117 Wn.2d 382, 389, 390, 816 P.2d 18 (1991). Under the enabling statute, Title 28, U.S.C. §1257(a), this Court lacks jurisdiction to review questions not passed upon by the court below. Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969); Michigan v. Long, 463 U.S. 1032, 1035, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). This Court should therefore decline to decide the question of whether or not Tukwila Ordinance No. 1465 leaves open reasonable alternative channels of communication.

B. There are independent and adequate state grounds for the Washington Supreme Court's determination of non-severability.

At p. 15 of the Petition, the Petitioner's counsel argues:

> At a minimum, Ordinance 1465 should be found constitutional with respect to the defined 'on premises' adult entertainment establishments.

The suggestion that the constitutional portion of the ordinance should be severed from the unconstitutional sections was rejected by the Washington Supreme Court when it denied the Petitioner's motion for reconsideration.

A state court judgment which rests on independent and adequate state law grounds is unreviewable by the United States Supreme Court pursuant to its appellate jurisdiction. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 495 U.S. ___, 110 L. Ed. 2d 17, 110 S. Ct. ____ (1990). Severability of a statute is a question of legislative intent and is resolved by reference to local law. Brockett v. Spokane Arcades,

Inc., 472 U.S. 491, 506, 86 L. Ed. 2d 394, 105 S. Ct. 1794 (1985). Erroneous construction of a state statute does not present a federal question. Neblett v. Carpenter, 305 U.S. 297, 83 L. Ed. 182, 59 S. Ct. 170 (1938); King v. West Virginia, 216 U.S. 92, 54 L. Ed. 396, 30 S. Ct. 225 (1910). This court has also held that the decision of a state court that a void provision of a state statute is severable from its valid portion does not present a federal question. King v. West Virginia, supra at p. 101.

Since the Washington Supreme Court's determination of non-severability was one of statutory construction and rested on independent and adequate state law grounds, this court lacks jurisdiction to decide the issue of severability.

C. The Petitioner is asking this Court to decide issues that are moot.

Following the decision of the trial court striking Tukwila Ordinance No. 1465, the Petitioner enacted Ordinance No. 1581 dealing with the same subject matter. See Appendix B. Section 1(A) of Ordinance 1581 makes reference to the experience of the City of Tukwila with adult entertainment establishments and establishes a new legislative record. Appendix B-4. Section 1(B) changes the definitions of "adult bookstore," "adult video store," and "adult retail store" from businesses which maintain "ten percent or more of their stock in trade" as sexually explicit material to "thirty percent or more." Appendix B-5 through B-9. Section 2 allocates a different area of the City - the CM district - to

adult entertainment establishments. Appendix B-11.

Enactment of a superseding statute which satisfies all the principles sought in an earlier attack moots the case. Kremens v. Bartley, 431 U.S. 119, 129, 130, 52 L. Ed. 2d 184, 97 S. Ct. 1709 (1977) and see also, Wright, Miller and Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters, §3533.6, pp. 342, 343. On the other hand, a judgment invalidating a state statute is not rendered moot by reason of an amendment of the statutory provision in question where the amendment contains an identical provision. Schall v. Martin, 467 U.S. 253, 256, n.6, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984) and see also Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1331, 1332 (9th Cir. 1987).

The amendments to the definitional sections of the ordinance and the provision governing where adult entertainment establishments can locate are not identical to the original provisions and are obvious efforts to address the constitutional defects which were the basis of the lower court's decision. The questions regarding the constitutionality of these portions of Ordinance No. 1465 are therefore moot.

At first blush, the two ordinances are the same in the sense that both apply to sexually oriented businesses which are predominately retail in character. However, the Washington Supreme Court did not determine that Ordinance No. 1465 was unconstitutional on its face because it applied to these businesses but rather that the legislative record did not contain the necessary evidence to support

the City's position. Ordinance No. 1581 is based upon an entirely different legislative record which makes reference to the experience of the City of Tukwila and surrounding cities with adult entertainment uses. Therefore the decision of the court below striking the ordinance on the basis of an inadequate legislative record is also rendered moot by the enactment of the new ordinance.

D. The decision of the Washington Supreme Court does not conflict with previous decisions of this Court.

According to the decision of this Court in City of Renton v. Playtime Theater, Inc., supra, content neutral adult entertainment zoning ordinances must serve a significant governmental interest and leave open reasonable alternative channels of communication. 475 U.S. 49, 50. This is an application of the standard for judging the

constitutionality of time, place and manner restrictions articulated in such cases as Clark v. Community of Creative Non-Violence, supra. See City of Renton, supra at 50 wherein the Clark decision is cited with approval. In order to be upheld, time, place and manner restrictions must also be "narrowly tailored" to achieve the articulated governmental interest. Clark, supra at 293. This same principle was recognized in the Renton decision wherein this Court stated:

> Moreover, the Renton ordinance is 'narrowly tailored' to affect only the category of theaters shown to produce the unwanted secondary effects thus avoiding the flaw that proved fatal to the regulations in Schad v. Mt. Efraim, (cite omitted), and Erznoznik v. City of Jacksonville, (cite omitted).

475 U.S. 52.

Similar analysis was employed by Justice Powell in his concurring opinion in Young v. American Mini Theaters, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). In that decision, Justice Powell analyzed the constitutionality of the Detroit ordinance under the four part test of U.S. v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Under the fourth prong of the O'Brien test, the restriction on speech must be no greater than essential to achieve the asserted governmental interest. With respect to this part of the O'Brien test, Justice Powell stated:

> The evidence presented to the common council indicated that the urban deterioration was threatened, not by the concentration of all movie theaters with other 'regulated uses,' but only by a concentration of those that elected to specialize in adult movies. The case would be a different situation had Detroit

> brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.

427 U.S. 82, (emphasis supplied).

The concept of a "narrowly tailored" ordinance received further definition in Ward v. Rock Against Racism, 491 U.S. 781, 103 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). Under this standard, the ordinance need not be the least restrictive or least intrusive means to serve the government's interest. 491 U.S. 798. The government need only show that the asserted interest would be achieved less effectively absent the regulation. This Court went on to state:

> To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial

> portion of the burden on speech does not serve to advance its goals.

491 U.S. 799.

In Board of Trustees SUNY v. Fox, 492 U.S. 469, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989), Justice Scalia described the "narrowly tailored" test as requiring a "fit" between the legislative ends and the means chosen to accomplish those ends. 492 U.S. 480.[3] He distinguished this test from the rational basis test which allows a law to be upheld if it could be thought to further a legitimate governmental interest without reference to whether it does so at inordinate cost. Id. Under the narrowly tailored test,

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[3] This opinion is significant also because it involves "commercial speech" which is recognized as being a less protected form of speech.

the governmental goal must be substantial and the cost carefully calculated. Id. The State bears the burden of justifying its restriction and it must establish "the reasonable fit." Id.

Thus, the "narrowly tailored" test is necessarily fact specific and assumes that the government will carry the burden of justification. Both Renton and Young specifically recognize that an exclusionary zoning ordinance would not be narrowly tailored if it applied to theaters which were not shown to contribute to the deterioration of surrounding areas. This is tantamount to saying that such a law burdens "substantially more speech than is necessary to further the government's legitimate interest." Ward, supra at 799.

The determination by the Washington Supreme Court that Ordinance No. 1465 is not narrowly tailored rested on the absence of a showing by the Petitioner that adult entertainment businesses with predominately take home merchandise have the same harmful secondary effects as those traditionally associated with adult movie theaters. World Wide Video v. Tukwila, supra at 389, 390. It rested also on the trial court's finding that none of the studies considered by the Petitioner establish that businesses which limit their stock in trade to "ten percent or more" sexually explicit material have adverse secondary effects. Id. Lower courts applying the substantial governmental interest prong of the Renton test have insisted that there be evidence in the record, which could consist of studies done by other

cities, which establishes that secondary effects actually exist and are the result of the businesses subject to regulation. Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987). Lower courts have also found that exclusionary zoning ordinances are not narrowly tailored to the extent that they apply to a movie theater which shows a single adult film, in the absence of evidence that a single showing of an adult movie would have any harmful secondary effects on the community. Tollis, Inc. v. San Bernardino County, supra at 1332; People v. Superior Court (Lucero), 259 Cal. Rptr. 740, 746 (Cal. 1989). The Respondent submits that these lower court decisions are faithful

renditions of the Renton principle and they support the position of the Washington Supreme Court.

This Court in City of Renton said that cites could rely on the studies done by other cities, "so long as whatever evidence the city relies upon is reasonably believed to be necessary to the problem that the city addresses." 479 U.S. 51. The Fifth Circuit in SDJ, Inc. v. City of Houston, supra stated that a legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experience of other cities. 837 F.2d 1274. The land use studies considered by the Petitioner all dealt with traditional auditorium style movie theaters with conspicuous advertising and which necessarily attract a concentration of audience members for on-premises

viewing.[4] There is nothing in these studies to support a reasonable inference that predominately retail businesses whose only similarity is the content of published materials would have the same impact on surrounding neighborhoods as auditorium style theaters. This conclusion is made even more obvious by the city's failure to make use of readily available evidence derived from the Respondent's business, or other video stores in the region, to support its position. The Petitioner's claim on page 25 of its Petition that "the city

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[4] This includes the land use study in North End Cinema, Inc. v. Seattle, 90 Wn.2d 209, 585 P.2d 1153 (1978) which provided the legislative record in the Renton decision. See City of Renton, supra at 51.

looked at all available evidence" is simply false and is contradicted by the express finding of the trial court.

E. This court should defer to the factual findings of the court below which were the basis of the judgment.

The trial court made a finding that businesses which limit their inventory to ten and a half percent sexually explicit matter do not cause adverse secondary effects. The trial court also made a finding that there was readily available evidence which would have enabled the Petitioner to determine the land use impacts of the plaintiff's business and the Petitioner failed to consider it. Finally, the Washington Supreme Court made a finding based upon the record below that the Petitioner failed to marshal sufficient evidence to establish that retail establishments which sell or

lease sexually explicit materials for perusal in the privacy of the home have adverse secondary impacts on surrounding neighborhoods. These findings were dispositive of the case and led to the conclusion by the Washington Supreme Court that Ordinance No. 1465 was not narrowly tailored.

While state court findings bearing on federal constitutional rights are not conclusive upon this Court, they are entitled to great weight. Michel v. Louisiana, 350 U.S. 91, 96, 100 L. Ed. 83, 76 S. Ct. 158 (1955). This Court will customarily accept the factual findings of state courts in the absence of exceptional circumstances. Liquor Corp. v. Duffy, 479 U.S. 335, 351, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987). While this Court might draw different conclusions from the evidence in this

record if it were reviewing the case de novo, or if it were considering the judgment of a lower federal court, there are no "exceptional circumstances" present to enable this Court to make findings different than those relied on by the Washington Supreme Court and which were the basis of the judgment.

IV. CONCLUSION

The decision of the Washington Supreme Court in this case doesn't stand for a broad ranging principle which will significantly affect the future of land use regulation. The decision of the lower court was essentially based on resolution of disputed facts. The Washington Supreme Court simply found that under the unique facts of this case, the Petitioner failed to sustain its burden of proof. There is no res judicata bar of any significance. There

is nothing to prevent the Petitioner from taking advantage of readily available evidence and reenacting similar legislation, which conceivably it has already done with the passage of Ordinance No. 1581. The Petition for a Writ of Certiorari should therefore be denied.

RESPECTFULLY SUBMITTED this 23rd day of March, 1992.

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No. 56619-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

WORLD WIDE VIDEO OF WASHINGTON,
Appellant and Cross-Respondent

v.

CITY OF TUKWILA, a Washington
municipal corporation,
Respondent and Cross Appellant

CITY OF TUKWILA'S MOTION FOR RECONSIDERATION

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Rules

RAP 12.4..... 1, 2

The City of Tukwila submits this motion for reconsideration pursuant to Rules of Appellate Procedure 12.4:

I. IDENTITY OF MOVING PARTY.

Respondent and Cross-Appellant the City of Tukwila requests the relief designated in paragraph 2 below.

II. STATEMENT OF RELIEF SOUGHT.

The City of Tukwila requests that this Court reconsider that portion of its September 19, 1991 decision in this matter, described more fully below, which ascribes the same federal constitutional analysis to both the peep show [motion picture] portion and the "take-home merchandise" portion of World Wide Video's business.

III. FACTS RELEVANT TO MOTION

This Court recognized that World Wide Video, in one location, sells and rents sexually explicit magazines and

video tapes, and it also operates eight peep show booths on the premises. Exhibit A, Slip Opinion, at 2, Finding of Fact No. 2. The peep show booths were the focus of much trial testimony, generally centered around illegal activity occurring in and around those booths. Finding of Fact Nos. 5 and 39-47, and City's Opening Brief at pp. 13-16. Under Ordinance No. 1465 (attached as Exhibit B), the zoning ordinance at issue in this case, the peep show booths fall within the definition of "adult motion picture theater". Exhibit B, Section 1 at TMC 18.05.825(A)(5).

IV. GROUNDS FOR RELIEF AND ARGUMENT.

Rule of Appellate Procedure 12.4 authorizes a party to file a motion for reconsideration of a decision terminating review.

The Court recognized that:

> "In addition to selling and renting sexually explicit magazines, novelties, and video tapes, WWV has eight panoram, or peep show, booths on the premises....
>
> Ordinance 1465 regulates adult motion picture theaters, adult bookstores, adult video stores, adult retail stores, and other adult uses." [Emphasis added.]

Slip Opinion at 2.

The Court also recognized that the "written or filmed materials distributed by WWV are 'pure' speech for the purposes of the First Amendment." Slip Opinion at 6. In two passages critical to this motion, however, the Court goes on to say that:

> "Tukwila has not shown that adult businesses with predominantly 'take home' merchandise (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the 'substantial governmental interest' portion of the test has not been met."

Slip Opinion at 7.

And further:

> "The Tukwila ordinance does not pass this test; it strives to regulate forms of expressive activity different from those studied in the materials upon which it relies."

Slip Opinion at 8-9.

The City considered a wide range of materials from a wide variety of sources in enacting Ordinance No. 1465. See, e.g., Trial Exhibits 2-6, Finding of Fact Nos. 9-11. Those materials make clear, especially when coupled with Senior Planner Jack Pace's testimony, that the City was well aware of the undesirable secondary effects associated with adult motion picture theaters and live nude entertainment. Mr. Pace specifically identified three adverse land use impacts associated with the adult entertainment: increase in crime, decrease in property

value, and incompatibility with other uses. Trial Exhibit 3, pp. 3-5; III RP 390: 6-392:1.

This was not a case of Mr. Pace ignoring relevant studies or other literature regarding the impacts of adult video stores -- there simply were none to be found. Mr. Pace was looking for "all studies that were available that were relevant to what we were looking at." See I RP 117:11-123:2.

The undesirable effects associated with adult motion picture theaters and live adult entertainment (as opposed to effects with "take-home" merchandise), however, are well known and were included in the trial record. Ordinance No. 1465 includes a severability clause. Exhibit B, at Section 5. Applying the studies and trial testimony in conjunction with the severability clause, together with

this Court's reasoning, only the definitions of "adult bookstore", "adult retail store", and "adult video store" should be found unconstitutional. Exhibit B at Section 1, TMC 18.06.825(A)(2), (6), and (8). The remaining definitions involve adult entertainment establishments different than those which deal in "take-home" pornographic merchandise. The undesirable effects associated with these "on-site" adult entertainment establishments are well documented and are part of the trial record. The City is entitled to rely on those reports under Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

By severing the ordinance's application to "take-home" establishments, the Court is able to

uphold the constitutionality of the remainder of the ordinance. "Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." Slip Opinion at 11.

V. CONCLUSION

The City requests that this Court reconsider its decision and strike only the application of Ordinance No. 1465 to the defined "take-home" establishments of adult bookstores, retail stores, and video stores.

DATED this 8th day of October, 1991.

Respectfully submitted,

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CITY OF TUKWILA

Ordinance No. 1581

AN ORDINANCE OF THE CITY OF TUKWILA, WASHINGTON, REENACTING AND AMENDING SECTION 18.06.825 OF THE TUKWILA MUNICIPAL CODE TO DEFINE "ADULT ENTERTAINMENT ESTABLISHMENTS", ADDING A NEW SUBSECTION 18.38.020(16) TO THE TUKWILA MUNICIPAL CODE TO ALLOW ADULT ENTERTAINMENT FACILITIES TO LOCATE IN THE C-M (INDUSTRIAL PART) DISTRICT, AMENDING SECTION 18.30.020(33) RELATING TO THEATERS IN C-2 ZONING DISTRICTS, AND ADDING A NEW SECTION 18.70.110 TO THE TUKWILA MUNICIPAL CODE REGARDING NONCONFORMING ADULT ENTERTAINMENT ESTABLISHMENTS.

WHEREAS, the City of Tukwila Planning Commission conducted a public hearing at which it heard testimony, reviewed exhibits, and deliberated on the issue of appropriate land use regulations governing adult entertainment establishments in the City of Tukwila, and

WHEREAS, as a result of said deliberation, the Planning Commission adopted findings and conclusions and formulated a recommendation to the City Council, and

WHEREAS, having held further public hearings on the matter and having considered the record before the Planning Commission and the recommendations of that body, the City Council concurred in part with those recommendations and adopted findings and conclusions, now, therefore,

THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Adult Entertainment Establishments Defined. Section 18.06.825 of the Tukwila Municipal Code is hereby amended to read as follows:

18.06.825 Adult Entertainment Establishments.

A. Legislative Findings. The City Council of the City of Tukwila, Washington, declares that adult entertainment establishments as defined in this chapter are permitted uses in the City of Tukwila. In order to preserve and protect Tukwila's unique quality of life, however, the City Council finds that adult entertainment establishments must be situated so as to minimize contact with the City's children, churches, parks,

schools, libraries, and other places where children and families gather.

The City Council finds further that Tukwila's experience, and the experiences of other cities in and around Tukwila and in other areas of the country, confirm that adult entertainment establishments can lead to an increase in crime and unreported criminal activity, a decrease in property values and the use and enjoyment of such property by its owners, and to undesirable blighting of the city and its neighborhoods. Accordingly, the City Council declares the provisions of this ordinance as they relate to adult entertainment establishments to be in the best interests of the citizens of the City of Tukwila,

simultaneously ensuring the protection of the health, safety and welfare of Tukwila residents, while also permitting adult entertainment establishments to locate in areas comprising approximately twenty-five percent of the City of Tukwila.

B. "Adult entertainment establishments" means adult motion picture theaters, adult drive-in theaters, adult bookstores, adult cabarets, adult video stores, adult retail stores, adult massage parlors, adult sauna parlors or adult bathhouses, which are defined as follows:

1. "Adult bathhouse" is a commercial bathhouse which excludes any person by virtue of age from all or any portion of the premises.

2. "Adult bookstore" is a retail

establishment in which thirty percent or more of the "stock in trade" consists of books, magazines, posters, pictures, periodicals or other printed materials distinguished or characterized by an emphasis on matter depicting, deriving or relating to "specified sexual activities" or "specified anatomical areas".

3. "Adult cabaret" is a commercial establishment which presents go-go dancers, strippers, male or female impersonators, or similar types of entertainment and which excludes any person by virtue of age from all or any portion of the premises.

4. "Adult massage parlor" is a commercial establishment in

which massage or other touching of the human body is provided for a fee and which excludes any person by virtue of age from all or any portion of the premises in which such service is provided.

5. "Adult motion picture theater" is a building, enclosure, or portion thereof, used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" for observation by patrons therein and which exclude any person by virtue of age from all or any portion of the premises.

6. "Adult retail store" is a retail establishment in which thirty percent or more of the "stock in trade" consists of items, products or equipment distinguished or characterized by an emphasis on or simulation of "specified sexual activities" or "specified anatomical areas".

7. "Adult sauna parlor" is a commercial sauna establishment which excludes any person by virtue of age from all or any portion of the premises.

8. "Adult video store" is a retail establishment in which thirty percent or more of the "stock in trade" consists of prerecorded video tapes, disks, or similar material

distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas".

C. "Specified anatomical areas" means:

1. Less than completely and/or opaquely covered human genitals, pubic region, buttock, or female breast below a point immediately above the top of the areola.

2. Human male genitals in a discernibly turgid state even if completely or opaquely covered.

D. "Specified sexual activities" means:

1. Acts of human masturbation, sexual intercourse or sodomy; or

2. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast; or

3. Human genitals in a state or sexual stimulation or arousal.

E. "Stock in trade" means:

1. The dollar value of all products, equipment, books, magazines, posters, pictures, periodicals, prerecorded video tapes, discs, or similar material regularly available in the normal course of the business of that establishment and readily available for purchase, rental, viewing or use by patrols of the establishment, excluding material located in any store room or other portion of the

premises not regularly open to patrons; or

2. The number of titles of all products, equipment, books, magazines, posters, pictures, periodicals, other printed materials, prerecorded video tapes, discs, or similar material regularly available in the normal course of the business of that establishment and readily available for purchase, rental, viewing or use by patrons of the establishment, excluding material located in any store room or other portion of the premises not regularly open to patrons.

Section 2. Adult Entertainment Establishments allowed in C-M District.

A new subsection 18.38.020(16) is hereby added to the Tukwila Municipal Code to read as follows:

(16) Adult entertainment establishments, subject to the following location restrictions.

A. No adult entertainment shall be allowed within the following distances from the following specified uses, areas or zones, whether such uses, areas or zones are located within or outside the City limits;

1. In or within 1,000 feet of any R-1, R-2, R-3, R-4, or RMH zone district or any other residentially zoned property;

2. In or within 1,000 feet of:

a. public or private school with curricula equivalent to elementary, junior or

senior high schools, or any facility owned or operated by such schools, which has twenty-five percent or more of its students under the age of eighteen; and

b. care centers, preschools, nursery schools or other child care facilities.

3. In or within 1,000 feet of:

a. public park, trail, or public recreational facility; or

b. church, temple, synagogue or chapel; or

c. public library.

B. The distances specified in subsection A shall be measured by following a straight line from the nearest point of the property parcel

upon which the proposed use is to be located, to the nearest point of the parcel of property or land use district boundary line from which the proposed land use is to be separated.

C. No adult entertainment establishment shall be allowed to locate within 1,000 feet of an existing adult entertainment establishment. The distance specified in this section shall be measured by following a straight line between the nearest points of public entry into each establishment.

Section 3. Theaters in C-2 Districts. Section 18.30.020(33) of the Tukwila Municipal Code is hereby amended to read as follows:

(33) Theaters, except those theaters which constitute "adult

entertainment establishments" as defined by this Code.

Section 4. Nonconforming Uses. A new section 18.70.110 is hereby added to the Tukwila Municipal Code to read as follows:

18.70.110 Nonconforming Adult Entertainment Establishments; Extensions of Time. Notwithstanding any other provisions of Ordinance _____ of the City shall be terminated or discontinued within 90 days from the effective date of that ordinance.

A. The owner or operator of any adult entertainment use or establishment which is rendered nonconforming by the provisions of Ordinance ____ of the City may appeal the 90-day termination provision of this section by filing a notice of appeal

with the City Clerk within 60 days of the effective date of this section.

B. Within 10 days of receipt of a notice of appeal, the City Clerk shall schedule a hearing on the appeal before a hearing examiner. The hearing shall be no later than 20 days from the date of receipt by the City of the notice of appeal, unless extended by mutual agreement of the parties. The hearing examiner shall be the City Clerk of his/her designee.

C. Within 3 days, excluding weekends and holidays recognized by the City, from the date of the hearing on an appeal under this section, the hearing examiner shall issue a written decision, which shall set forth the hearing examiner's

findings of fact and conclusions of law. The hearing examiner shall consider the following factors and any other facts that he/she determines to be relevant or helpful in reaching a decision:

1. The harm or hardship to the appellant caused by the 90-day termination provision of this section.
2. The benefit to the public to be gained from termination of the use;
3. The nature of the leasehold or other ownership interest that an appellant may have in premises occupied by the adult entertainment use;
4. Restrictions or lack of same imposed on an appellant's use of such premises by a lease or

other binding agreement;

5. Amounts expended by an appellant for improvements to such premises or for necessary equipment and the extent to which those amounts have been recovered through depreciation, tax savings, or whether such improvements are contemplated to be left as property of the lessor; and

6. Any clear evidence of substantial economic harm caused by enforcement of the 90-day termination provision of this section.

D. Appeal and hearing:

1. Any person aggrieved by the action of the hearing examiner in refusing to extend beyond 90 days the period in which a

nonconforming use must terminate operations shall have the right to appeal such action to the City Council, by filing a notice of appeal with the Clerk within 10 calendar days of receiving notice of the decision of the hearing examiner.

2. The City Council, upon receipt of a timely notice of appeal, shall set a date for a hearing of such appeal within 20 days from the date of such receipt. The City Council shall hear testimony, take evidence and may hear oral argument and receive written briefs. The filing of such appeal shall stay further action of the City, pending the decision of

the City Council.

3. The decision of the City Council on an appeal from a decision of the hearing examiner shall be based upon a preponderance of the evidence.

4. The decision of the City Council shall be final unless appealed to the superior court within 20 days of the date the decision is entered.

Section 5. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality or any other section, sentence, clause or phrase of this ordinance.

Section 6. Effective Date. This

ordinance shall take effect and be in full force five (5) days after publication of the attached summary which is hereby approved.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a regular meeting thereof this 1st day of October, 1990.

APPROVED:

_____
MAYOR, GARY L. VAN DUSEN

ATTEST/AUTHENTICATED:

_____
CITY CLERK, JANE CANTU

APPROVED AS TO FORM:
OFFICE OF THE CITY ATTORNEY:

By_____
MICHAEL KENYON

FILED WITH THE CITY CLERK: 9-27-90
PASSED BY THE CITY COUNCIL: 10-1-90
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EFFECTIVE DATE: 10-12-90
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